*** HONOURABLE SRI JUSTICE B.SESHASAYANA REDDY**

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+WRIT PETITION NO.25150 OF 2004

% 21-06-2005

M/s. FLY WHEEL TRAVELS .. PETITIONER

VS.

$ Bharat Sanchar Nigam Limited & another ..RESPONDENT

! COUNSEL FOR PETITIONER: MR.VILAS V.AFZULPURKAR

^ COUNSEL FOR THE RESPONDENT: MR.A.RAJASHEKAR REDDY
(ASST.SOLICITOR GEN. Of INDIA) Dr.P.BHASKARA MOHAN

< Gist:

> Head Note:

? CITATIONS:

1. (2004) 3 SCC 553
2. 1999(5) ALD 398

3. (2004) 12 SCC 327

IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

TUESDAY, THE TWENTY FIRST DAY OF JUNE
TWO THOUSAND AND FIVE

PRESENT

THE HON'BLE MR JUSTICE B.SESHASAYANA REDDY

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WRIT PETITION NO : 25150 of 2004

Between:

M/s. FLY WHEEL TRAVELS, A Registered Partnership Firm Bearing Regn. No.857 having their Office at 5-9-202, Chirag Ali Lane, Hyderabad Rep. by its Partner Sri Abdul Rahman Saleem,S/o. Abdul Sattar.

..... PETITIONER

AND

1. Bharat Sanchar Nigam Limited, Suryalok Complex, Abids, Hyderabad, Rep. by its Principal General Manager.
2. The Assistant General Manager, (Administration), Bharat Sanchar Nigam Limited, Suryalok Complex, Abids,

.....RESPONDENTS

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed herein the High Court may be pleased to issue a Writ, order or Direction in the nature of Mandamus or otherwise declaring the proceedings of cancellation No.WM/142/BSNL/hyd/Tenders/ 2004-05/57 dt. 20/21-12-2004 (Annexure VII) as well as the consequential proceedings of even number and date (Annexure VIII) of the respondents be declared as illegal, arbitrary, unenforceable and consequently direct the respondents to act in accordance with their acceptance letter (Annexure III) herein by taking all consequential steps including conclusion of the agreement and working of the said work envisaged under the aforesaid tender from the petitioner for the year 2004-05 in terms of Annexure III and be pleased to pass such other order or orders.

Counsel for the Petitioner: MR.VILAS V.AFZULPURKAR

Counsel for the Respondents : MR.A.RAJASHEKAR REDDY (ASST.SOLICITOR GEN. Of INDIA) Dr.P.BHASKARA MOHAN

The Court made the following :

O R D E R :

1. This Writ Petition is filed by M/s.Fly Wheel Travels, a partnership firm, with a prayer to issue a Writ of Mandamus declaring the proceedings of cancellation bearing LR.No.WM/142/BSNL/HYD/ Tenders/2004-05/57, Dated: 20/21-12-2004 as well as the consequential proceedings of even date bearing LR.NO.WM/142/BSNL/ HYD/HV/TENDERS/04-05/59 of the respondents as illegal, arbitrary and unenforceable and consequently direct the respondents to act in accordance with their acceptance letter No.WM 142/BSNL/HV/ TENDERS/04-05/37, DATED 16-11-2004.

2. The facts that led to filing of the Writ Petition be stated briefly as under:

Bharat Sanchar Nigam Limited, Suryalok Complex, Abids, Hyderabad (for short BSNL)-1st respondent herein, invited tenders for hiring light motor vehicles such as non-AC Ambassador cars, jeeps, matadors etc. in Hyderabad Telecom District. About eleven persons responded to the tender notification. A tender committee evaluated the tenders, had shortlisted eight tenderers out of eleven and had called them for negotiations on 4.10.2004. The respondents accepted the petitioner's tender and required the petitioner to pay or give bank guarantee for Rs.3.50 lakhs towards security deposit and to submit non-judicial stamp paper for entering into an agreement. The petitioner secured the requisite bank guarantee from State Bank of Hyderabad, Malakpet Branch, Hyderabad. When the petitioner went to furnish the bank guarantee, the respondents refused to accept the same and issued letter dated 22.11.2004 asking him to submit once again proof of experience with any State or Central Government Organisation or Public Sector undertaking and copies of hired vehicle bills, cheques or DDs etc. The petitioner submitted the requisite information on 26.11.2004 together with copies of bills, details of vehicles hired to N.C.R.I. and the cheques issued by National Council for Rural Institutes, Hyderabad. The petitioner received communication on 24.12.2004 whereunder the respondents informed the petitioner of the cancellation of the tender and also calling for explanation as to why it should not be blacklisted and its EMD of Rs.56,000/- shall not be forfeited. Questioning the rejection of tender and the show cause notice as to black listing and forfeiture of EMD of Rs.56,000/-, this writ petition is filed.

3. The Writ Petitioner filed WPMP.No.32868 of 2004 seeking suspension of the show cause notice issued by the respondents proposing to black list it and to forfeit the entire EMD pending disposal of the Writ Petition. This court by order dated 31-12-2004 permitted the petitioner to file additional material and also directed the respondents to consider the explanation submitted by the petitioner to show cause notice and pass appropriate orders there on in accordance with law. The respondents considered the explanation and additional material furnished by the petitioner and passed orders on 2.2.2005 whereunder the explanation offered by the petitioner was found to be not satisfactory and reserved their right to proceed further in accordance with the said show cause notice.

4. The respondents filed counter affidavit. It is averred in the counter affidavit that the total number of participated tenderers are only ten. The experience certificate submitted by the petitioner-firm from national Council for Rural Institutes, Hyderabad is reported to be false and that the petitioner firm does not exist at the given address. The bank guarantee is not received in the office of the respondents. The petitioner does not possess the requisite experience. The petitioner submitted the tender as a proprietary concern and whereas filed the writ petition as a partnership firm. The tender was cancelled as per the powers conferred on the respondents in clause 21 of Schedule II of the Bid Documents. In the departmental enquiry it was found that M/s.Fly Wheel Travels-petitioner firm submitted false information or documents and hence the petitioner-firm was recommended to be black listed and EMD amount was to be forfeited. As per the interim orders dated 31.12.2004 passed by this court in WPMP.No.32868 of 2004 the additional material filed by the petitioner has been received, considered and a reply was also sent. The petitioner firm has not produced any legally tenable documents despite providing sufficient opportunity. Thus, the writ petition is misconceived and is not maintainable and the same is liable to be dismissed.

5. Heard Sri.Vilas Afzul Purkar, learned counsel for the petitioner-firm and Dr.Bhaskara Mohan, counsel appearing for the respondents.

6. Sri.Vilas Afzul Purkar, learned counsel for the petitioner-firm submits that

cancellation of the tender after acceptance is impermissible and the action of the respondents in canceling the tender is arbitrary and, therefore, the writ is maintainable. He further submits that the respondents being instrumentalities of the State are not expected to act in an arbitrary manner even in the matter of contract. Since the respondents are discharging the public duty, the writ petitioner questioning their arbitrariness even in contractual matters is maintainable. He would further contend that the experience of Abdul Rehman Saleem, one of the partners of the firm, is to be counted as experience of the firm in reckoning with the requisite number of years of experience as stipulated in the tender notification. Reliance has been placed on the decision of Supreme Court in ABL INTERNATIONAL LTD. v. EXPORT CREDIT GUARANTEE CORPN. OF INDIA LTD. and the decision of our High Court in S.KIREETENDRANATH REDDY V. A.P. TRANSCO, HYDERABAD.

7. In the first cited decision, the Supreme Court held that the High Court can intervene under Article 226 of the Constitution of India if the State or its instrumentalities acts in an arbitrary manner even in a matter of contract. In the second cited decision our High Court held as follows:

> " It is well settled that a firm is not a legal entity, but is only a collective of compendious name of all partners. It is neither a legal entity nor a person. A firm has no legal existence apart from its partners. A firm-name is really a description of the individuals who compose it. The essential characteristic of a firm is that each partner is a representative of the other partners. Each of the partners is an agent and a principal. He is an agent in so far as he can bind the other partners by his acts within the scope of the partnership business and he is principal to the extent that he is bound by the acts of the other partners. The liabilities of the firm can be enforced against each of the partners personally."

It is further held that since a firm does not have its own distinct and separate personality apart from the personality of partners who compose it no experience can be attributed to it in law, and the so called personified experience of a firm, in reality, is nothing but the experience of the partners who compose it.

8. Dr.Bhaskara Mohan, learned counsel appearing for the respondents submits that

the tender has been submitted by Abdul Rahman Saleem as the proprietor of M/s Fly Wheel Travels, Hyderabad and therefore the writ petition filed by him as a partner of M/s Fly Wheel Travels, Hyderabad is misconceived and thus the writ petition is liable to be dismissed inlimini. He further submits that Abdul Rahman Saleem as proprietor of M/s Fly Wheel Travels, Hyderabad has furnished certain information with regard to his experience and the said information on due enquiry found to be false and therefore the action of the respondents in canceling the tender is not arbitrary and the same is not liable to be questioned in this writ petition. It is also submitted by him that the tender came to be cancelled by the respondents by invoking clause 21 of II schedule of the Bid Documents (Instructions to Bidders).

9. It is well settled that a High Court would not entertain a writ petition involving disputed questions of fact vide decision of Supreme Court in STATE OF JAMMU AND KASHMIR V. GHULAM MOHD. DAR. It is also well settled that writ of or in the nature of mandamus would not ordinarily issue for enforcing the terms and conditions of a contract qua contract. A writ of mandamus would issue when a question involving public law character arises for consideration. I deem it appropriate to refer paragraph 3 of the cited decision and it is thus:

" 3. It is not disputed that the contract agreement entered into by and between the parties contains an arbitration agreement. Furthermore, the respondent herein filed the aforementioned writ petition for enforcing a contract qua contract. Although an objection has been taken as regards the maintainability of the writ petition by the appellant herein, the same unfortunately has not been considered by the High Court. It is well settled that writ of or in the nature of mandamus would not ordinarily issue for enforcing the terms and conditions of a contract qua contract. A writ of mandamus would issue when a question involving public law character arises for consideration. It is also well settled that the High Court would not entertain a writ petition involving disputed questions of fact. Keeping in view the aforementioned well settled principles of law, the impugned judgment cannot be sustained. They are set aside accordingly. The appeal is allowed. However, the parties appearing before us proposed that Justice R.P.Sethi, a former Judge of this Court be appointed as a sole arbitrator in terms of the arbitration agreement. Accordingly,

> we request Justice R.P.Sethi to act as the sole arbitrator. Learned counsel appearing for the parties also submitted that no plea as regards limitation would be raised before the learned arbitrator. The parties would be at liberty to approach Justice R.P.Sethi for the aforementioned purpose. The remuneration payable to the arbitrator shall be decided by the arbitrator himself. We may make it clear that the fees payable to the learned arbitrator would be decided by him and the award, if any, would be filed before the High Court."

10. It is not in dispute that M/s Fly Wheels Travels submitted tender as a proprietary concern. The respondents have specifically stated in para 3(a) of their counter affidavit that the petitioner submitted tender as a proprietary concern. The affidavit dated 17.6.2005 sworn to by Abdul Rahman Saleem shows that the petitioner firm is a proprietary concern. It is the contention of the counsel appearing for the petitioner that the experience of one of the partners in the petitioner firm is to be counted as experience of the firm. In this connection, reliance has been placed in the (2) cited decision. One fact is glaring that by the time Abdul Rahman Saleem submitted tender to the respondents it was no more a proprietary concern and it was a partnership concern, as per the certificate placed on record issued by the Registrar of Companies, which reveals that the partnership firm came into existence on 18.6.2004. When the tender has been submitted to the respondents by Abdul Rahman Saleem as sole proprietor of M/s Fly Wheel Travels, the very filing of the writ petition styling M/s Fly Wheel Travels as a partnership concern, in my view, cannot be justified. Be that as it may, the respondents cancelled the tender basing on the investigation conducted by their department. The question whether the report submitted by the investigation department of the respondents is based on sufficient material or not is beyond the scope of writ jurisdiction of this court. The action taken by the respondents in canceling the tender is based on some departmental investigation and by virtue of the powers conferred on them in the bid document. Clause 21 of Section II of the Instructions to Bidders empowers the respondents authorities to cancel the tender partly or fully without assigning any reason.

11. It is contended by learned counsel for the petitioner that the respondents authorities cannot cancel the tender after concluding the contract. As per the bid documents, award of hiring contract comes into operation after signing of agreement.

Clause 18 of the Bid document (Instructions to the Bidders) reads as follows:

" 18. Signing of Contract:

18.1. Signing of Agreement shall constitute the award of Hiring Contract on the Bidder.

18.2. Upon the successful Bidder furnishing the performance security the BSNL shall discharge its Bid Security in pursuant to clause-2."

12. The material placed on record establish that the respondents authorities have cancelled the tender basing on the departmental investigation and by invoking the powers under clause 21 of the Section II of Instructions to Bidders. Therefore, it cannot be said that the respondents authorities acted arbitrarily. When once the tender itself is cancelled, the question of black listing and forfeiture of EMD deposit does not arise.

13. In the result, this writ petition is partly allowed setting aside the show cause notice proposing to black list the petitioner firm and forfeiting EMD deposit. With regard to cancellation of tender, the order passed by the respondent authorities does not suffer from arbitrariness and it needs no interference.

Dated: 21st June, 2005. (B.Seshasayana Reddy, J)

Tnb

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That Rule Nisi has been made absolute as above.

Witness the Hon'ble Mr.Justice Bilal Nazki, the Acting Chief Justice on this day Twenty First June Two Thousand Five.

..... REGISTRAR

// TRUE COPY //

SECTION OFFICER

One fair copy to the Honourable Sri Justice

B.Seshasayana Reddy (for his Lordships kind perusal)

To

1. The Principal General Manager, BSNL, Suryalok Complex, Abids, Hyderabad.
2. The Assistant General Manager, BSNL, Suryalok Complex, Abids, Hyderabad.
3. Two copies to Mr.A.Rajashekar Reddy, Assistant Solicitor General, Central

Government, High Court Buildings, Hyderabad.

4) 2 CD copies

5) 1 CC to DR.BHASKARA MOHAN

6. 8 LR copies

7. The under Secretary, Union of India, Ministry of Law, Justice & Company Affairs, New Delhi.

8. The Secretary, A.P. Advocates' Association Library, High Court Buildings, Hyderabad.